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SIPDIS

STATE FOR L/LEI DAVID BUCHHOLZ
JUSTICE FOR DOJ/OIA STEWART ROBINSON

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TAGS: PREL KTIA KJUS KCRM PGOV SN
SUBJECT: U.S.-SINGAPORE MLAT DISCUSSIONS

REF: (A)04 SINGAPORE 1140, (B)03 STATE 319319

¶1. This is an action request. Please see para 17.

¶2. Summary: On December 7, 2005, Singapore and U.S. delegations met in Singapore to continue discussions related to a possible bilateral Mutual Legal Assistance Treaty (MLAT). Negotiators had met twice before, in discussions in April 2004 and in a round of negotiations in November 2003 in Washington (Ref A and B). Discussions this time focused on several overarching obstacles to progress, most of which are linked to Singapore's restrictive mutual assistance law. While Singapore showed some flexibility -- identifying one pending change to its law and expressing a willingness to consider others -- the GOS made clear that ultimately its domestic requirements must be reflected in the treaty in some fashion. The two sides agreed to continue informal contacts and exchanges of ideas on text and legislative changes in the coming months, with a view toward creating a basis for further negotiations. End Summary.

¶3. The U.S. delegation consisted of representatives from State L/LEI, the Department of Justice's Office of International Affairs, and Embassy Singapore. The Singapore representatives were from the Attorney-General's Chambers (AGC), the Ministry of Home Affairs, the Ministry of Law and an observer from the Monetary Authority of Singapore. Separately, Embassy Singapore and L/LEI met with the Ministry of Foreign Affairs (Septel).

Overarching Concerns

¶4. The impetus for this latest round of discussions on a Mutual Legal Assistance Treaty (MLAT) was a September 29 letter from the USG outlining four overarching areas of concern: (1) whether an MLAT would be entirely "subject to domestic law," as Singapore had proposed; (2) whether it would be limited to cover only offenses criminal in both countries ("dual criminality") or some other specified set of offenses; (3) whether it would contain an extensive set of limitations on when assistance could be granted; and (4) whether it would allow Singapore to provide assistance in situations in which charges had not yet been filed in the United States. These had been the key areas in which a fundamental difference of approach -- the United States preferring broad, open-ended obligations to assist and Singapore preferring limited, restricted obligations -- had manifested itself.

¶5. The Singapore delegation noted at the outset of the meeting that "the situation had changed" since the last discussions in April 2004 and that they felt they had more flexibility and were in a better position to make progress. They repeated this theme throughout the day. AGC's Mathew Joseph, the head of Singapore's delegation, specifically noted that Singapore no longer felt the treaty needed to correspond exactly with its domestic law: "That is where we were, not where we are," he said.

"Subject to Domestic Law"

¶6. Singapore expressed a willingness to consider the question of "subject to domestic law" on an article-by-article basis, rather than as the controlling principle of the treaty. This would have been a major concession, but it became clear in further discussions that it did not necessarily reflect an ability or willingness to dispose of the most troubling requirements of Singapore's domestic law (primarily in the Mutual Assistance in Criminal Matters Act of 2000). Rather, Singapore indicated that its "essential domestic requirements" would have to be reflected in each article of the treaty. These requirements, in many cases, will likely be unworkable for the United States, and the U.S. delegation indicated as much. Toward the end of the day, Singapore did leave open the possibility that it could seek legislative changes, where necessary, to accommodate cooperation.

Dual Criminality

¶7. One of Singapore's key concerns was the scope of offenses to which the treaty would apply, and Singapore seemed greatly mollified by a U.S. proposal that the treaty could be limited to cases in which dual criminality existed. This is consistent with the approach in Singapore's law, in which assistance is available only for certain listed "serious offenses." To ensure the treaty would cover the major crimes for which the United States seeks foreign evidence, the U.S. proposed that the treaty also contain an annexed list of offenses for which assistance would be granted regardless of whether they are recognized under Singapore law. Singapore expressed concern that it would be unable to provide certain types of assistance if an offense was not recognized in Singapore, thus making it unclear the U.S. proposal would work.

¶8. Singapore did, however, express a willingness to look at the specific offenses of concern to the United States. Significantly, Singapore shared with the United States a proposed amendment to its own list of "serious offenses" for which assistance could be granted. This proposed amendment, which Singapore has been preparing in part to comply with its Financial Action Task Force (FATF) obligations, would add approximately 150 offenses, including many of great importance to the United States (such as intellectual property crime, environmental crimes, computer crimes, securities offenses, and terrorism offenses), to the serious offense list. If it were to include all offenses of concern to the United States, such a list might obviate the need for an annex to the treaty. The Singapore delegation indicated that the list need not be approved by Parliament, as a Gazette notification was sufficient (analogous to a Federal Register Notice). When the U.S. delegation pointed out that gaps may still exist in the list, Singapore indicated that the list was not yet "cast in stone," and that if the United States wanted to suggest additions, Singapore would consider them.

Absence of Tax and Fiscal Crimes

¶9. One potentially problematic area is tax and fiscal offenses, which the United States noted are not on Singapore's current or proposed amended list of serious offenses. The U.S. delegation underscored the necessity of being able to request assistance in tax cases. Singapore suggested that tax assistance should come directly from revenue authority to revenue authority, and alluded to ongoing discussions on a proposed Double Taxation Agreement (DTA). Singapore also noted that it does not recognize certain types of fiscal offenses, such as those involving movement of currency. When the U.S. delegation pressed the issue, Singapore indicated it might be able to render assistance in a tax case if the facts of a tax or fiscal offense also supported other, recognized offenses such as fraud or money laundering. This is an issue requiring further study by the United States.

Limitations on Assistance

¶10. The two sides discussed at great length the issue of limitations on assistance. Singapore's domestic law contains 16 different grounds under which assistance can be refused, many of which it had previously sought to incorporate in treaty text. The Singapore delegation stressed that decisions to refuse assistance under its law are left to the discretion of the AGC, and that with a treaty partner it would exercise its discretion not to employ many of the grounds. Singapore offered that it now felt comfortable omitting some of the grounds from treaty language, and proposed that a treaty adopt language similar to that in the U.S.-Hong Kong MLAT, in which various grounds for refusal of requests -- some characterized as mandatory and some as discretionary -- are identified.

¶11. The U.S. side expressed a preference for including only 3-4 discretionary grounds for refusal, and sought clarification whether the omission of certain grounds from the treaty would have the effect of overriding domestic law provisions to the contrary. Singapore at first stated that the grounds for refusal would still apply if the AGC found them applicable. Later, however, the Singapore delegation indicated that, at least with respect to certain specific grounds for refusal (in particular, refusal based on "insufficient importance" of the evidence or "insufficient gravity" of the offense), omission from the treaty would mean that such grounds would not be used to deny requests and that it would be

up to Singapore to determine how to implement this treaty obligation domestically. In this context, Singapore stressed that, because its law applies to both treaty partners and non-treaty partners, it contains provisions that cannot be eliminated but would not be applied against treaty partners. Singapore also stressed that it would not look behind the face of U.S. assistance requests to seek out reasons to deny them (such as, for example, in the case of double jeopardy). (Comment: USG negotiators may wish to consider ways in which to reflect such assurances in treaty language, or a related exchange of notes, given the lack of clarity on their legal status under Singapore domestic law. End Comment.)

Assistance Before Charges?

¶12. On the issue of Singapore's ability to provide assistance in a situation in which no U.S. charges have yet been filed, Singapore clarified that the issue relates to only one type of assistance: testimony that must be obtained by compulsion. Under Singapore law, while police can compel witnesses to testify in a domestic investigation, there is no authority to compel the testimony of witnesses on behalf of a foreign government unless it is related to "criminal proceedings pending in a court." The U.S. delegation explained the grand jury process in the United States, and the need to be able to compel witness testimony during the grand jury stage. Singapore asked whether the grand jury could be considered a criminal proceeding pending in a court, and the U.S. delegation, while promising to report back on that question, expressed doubt. Singapore also indicated its view that this would not be a significant problem, because its police could generally convince witnesses to testify voluntarily (they indicated they had done this for other countries, including the Netherlands), and because witness testimony could sometimes be obtained in connection with a production order (i.e., when the witness is a records custodian).

¶13. Singapore noted that Canada has specific legislation authorizing it to provide compulsory assistance on behalf of foreign cases, and the U.S. delegation pointed out that Canada's legislation was adopted precisely to comply with a U.S.-Canada MLAT. The Singapore delegation volunteered that it might need a legislative amendment to solve this issue, and, in perhaps the most significant moment of the day, said it could consider doing the same thing Canada did.

Disclosure and Use of Evidence

¶14. Finally, the two sides discussed the question of whether the treaty could include language, previously suggested for deletion by Singapore, which contemplates and permits disclosure of evidence obtained under the treaty when required by the U.S. Constitution for exculpatory purposes. The U.S. delegation clarified the limited scope of this exception, and the Singapore delegation appeared satisfied with the U.S. explanation and willing to include the language. Furthermore, Singapore seemed willing to consider generally reversing the presumption that use of evidence produced under the treaty would be limited, absent consent; the U.S. side suggested, and Singapore seemed ready to accept, that the presumption should be that the evidence can be used for any purpose unless the state producing the evidence requests otherwise. In this regard, the U.S. delegation clarified that information requested under the MLAT would generally be for public use at trial, in contrast to intelligence or police-gathered information, which would continue to remain confi dential.

Next Steps

¶15. The two sides agreed to informally exchange information and proposals in the near future, including on those issues outlined in the action paragraphs below. In addition to those, the U.S. delegation asked the Singapore delegation to look again at Articles 1, 3, and 7 of the draft treaty in light of the discussions and consider proposing new text. Further next steps will depend on those interactions; no specific commitments were made regarding further negotiations.

Comment

¶16. The U.S. delegation viewed the discussions with cautious optimism. Singapore seemed ready to take several significant steps. The informal explorations of issues should continue, and will reveal whether further negotiations are worthwhile. The United States should

continue to put political pressure on Singapore to show flexibility, to achieve an effective, broad and useful MLAT.

Action Request

¶17. Action Request: The U.S. delegation identified three follow-up items for the United States from the discussions:

-- Per para 8, Department and Department of Justice are requested to review the Singapore-proposed list of new serious offenses against their own requirements for an MLAT and provide to Singapore (and Embassy) a list of any additional offenses for Singapore to consider.

-- Per para 11, Department and Department of Justice are requested to provide a list of limitations on assistance it would like to see reflected in the treaty. The GOS also agreed to provide us with its list and to exchange such lists informally. In addition, the U.S. delegation committed to look at certain language in other treaties, such as double jeopardy language in MLATs with the U.K., Ireland, Hong Kong, and Switzerland, and to report to the Singapore delegation on the meaning of the language "important public policy" in the essential interests clause of the U.S.-U.K. MLAT.

-- Per paras 12-13, Department and Department of Justice are asked to follow up with Singapore by providing information on the characterization of grand jury proceedings, as well as information on Canada's legislation on compulsory assistance for foreign cases and on similar legislation in the U.K.

¶18. Drafted by L/LEI David Buchholz.

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